

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2003 Session

**ORIGINAL CHRIST TEMPLE CHURCH v. ALEXANDER &
ASSOCIATES, INC.**

**Direct Appeal from the Chancery Court for Davidson County.
No. 01-28-I The Honorable Irvin H. Kilcrease, Jr., Judge.**

NO. M2002-02117-COA-R3-CV - Filed February 4, 2004

Between 1989 and 1991, appellant Original Christ Temple Church (“Church”) contacted appellee Alexander & Associates, Inc. (“Alexander”) to procure an insurance policy to cover its church building and contents in the event of loss. Church claims the original policy with Aetna Casualty and Surety guaranteed Church “100% replacement cost coverage.” In 1993, Alexander ceased writing insurance policies for Aetna, and Alexander procured a replacement policy for Church through a new insurer. On November 3, 1999, Church’s building was completely destroyed by fire. Church filed a complaint against Alexander on January 4, 2001 alleging negligence based on Alexander’s failure to advise Church of changes in its insurance coverage. Church additionally sought relief on grounds of fraud, intentional interference with contract rights, fraudulent concealment, negligent misrepresentation and breach of fiduciary duty. Church claimed its new policy issued by Alexander in 1993 did not guarantee the same amount of replacement cost coverage as its original policy. Alexander filed an answer on February 7, 2001 denying all allegations and raising an affirmative defense of statute of limitations. On June 3, 2002, Alexander filed a motion for summary judgment asserting Church’s complaint was time-barred by the applicable statute of limitations. In an order entered August 15, 2002, the trial court granted Alexander’s summary judgment motion finding the statute of limitations, as set forth in T.C.A. § 28-3-105, expired prior to Church’s filing of its complaint. Notice of this appeal soon followed. For the reasons set forth below, the order of the trial court granting summary judgment based on the applicable statute of limitations is reversed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

DON R. ASH, SP. J., delivered the opinion of the court, in which HIGHERS, J., and FARMER, J., joined.

Trippe S. Fried, Nashville, Tennessee, for the appellant, Original Christ Temple Church.

David B. Scott, Nashville, Tennessee, for the appellee, Alexander & Associates, Inc.

OPINION

I.

Appellant Original Christ Temple Church (“Church”), located in Nashville, purchased building and contents insurance coverage for its church property through the insurance agency of appellee Alexander and Pinnock n/k/a Alexander & Associates (“Alexander”).

Deacon Harold Shines (“Deacon Shines”), a church member formerly employed as a life insurance specialist with an unrelated insurance carrier, was delegated by the Church to handle insurance-related matters. Mrs. Ruth Johnson (“Mrs. Johnson”), a church administrator who had formerly worked as a homeowner underwriter for another unrelated insurance carrier, was responsible for keeping insurance records, maintaining the yearly renewal for the policy, and paying the yearly premium.

Between 1989 and 1991, Alexander procured an insurance policy for Church from Aetna Casualty and Surety at the direction of Deacon Shines. Church asserts it chose this policy because it provided “100% replacement cost coverage,” which, according to Church, would require the insurer to rebuild Church’s building in the same or an improved condition in the event that it was destroyed. Alexander ceased writing insurance policies for Aetna in 1993 and then issued Church a replacement insurance policy through Preferred Risk n/k/a GuideOne (“Preferred Risk”). After the replacement policy was issued, Church continued to receive renewal certificates along with premium notices, which Deacon Shines would typically review. Church paid the premiums on the Preferred Risk policy from 1993 through 1999.

On November 3, 1999, the Church’s building was completely destroyed by fire. The total damage exceeded \$2,000,000.00, and due to the age of the building and updated code requirements the church could not be rebuilt on the existing site. Upon receiving a claim filed for the loss, GuideOne offered Church the limits of liability pursuant to the building coverage and contents coverage of the existing policy. Church accepted the funds totaling approximately \$300,000.00.

On January 4, 2001, Church filed suit against Alexander claiming the original policy guaranteed 100% replacement cost coverage and the current policy no longer provided such coverage. Church’s complaint alleged negligence based on Alexander’s failure to advise Church of changes in its insurance coverage and alternatively sought relief for fraud, intentional interference with contract rights, fraudulent concealment, negligent misrepresentation and/or breach of fiduciary duty.

Church asserts documents necessary to procure the Preferred Risk coverage in 1993 had been completed and signed by Alexander’s part-owner, Debra G. Alexander (“Debra Alexander”), without ever consulting Deacon Shines or reviewing the documents with him. Church claims Alexander did not provide Church with a copy of the effective Preferred Risk policy until several months after the fire. Church asserts the replacement policy did not provide the same 100% replacement cost coverage as the original policy and was instead subject to specified policy limits. According to Church,

Alexander never advised appellant of this “fundamental change in its insurance and never sent [Church] a copy of the new policy.”

Alexander disputes Church’s allegations and maintains the reasons and details of the change of carriers were discussed with Deacon Shines in 1993. Alexander asserts Debra Alexander spoke with Deacon Shines about the coverage changes in the replacement policy and also prepared an application for coverage with Preferred Risk only *after* a proposal for the replacement coverage was sent to Deacon Shines. Alexander claims copies of all policies were sent to Church before the fire. On February 7, 2001, Alexander filed an answer denying Church’s allegations and affirmatively setting forth a statute of limitations defense.

On June 3, 2002, Alexander filed a motion for summary judgment based upon the expiration of the applicable statute of limitations prior to the filing of Church’s complaint. Church filed a timely response to the motion, and oral arguments were heard. The trial court entered an order granting Alexander’s motion for summary judgment on August 15, 2002. Church filed a timely Notice of Appeal of the trial court’s order of dismissal on August 30, 2002. The sole issue for this court’s consideration on appeal is whether the trial court erred in granting Alexander’s motion for summary judgment on the basis that the statute of limitations period set forth in *Tenn. Code Ann.* § 28-3-105 expired prior to the filing of the instant suit.¹

II.

The grant or denial of a motion for summary judgment by a trial court creates a question of law. Accordingly, appellate courts must review the trial court’s decision *de novo* without attaching any presumption of correctness to the trial court’s judgment.

Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn. 2000); **White v. Lawrence**, 975 S.W.2d 525, 529 (Tenn. 1998); **Robinson v. Omer**, 952 S.W.2d 423, 426 (Tenn. 1997).

The standards governing an appellate court’s review of a motion for summary judgment are well settled. Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Tenn. R. Civ. P.* 56.04. The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists, **Byrd v. Hall**, 847 S.W.2d 208, 211 (Tenn. 1993), and must either affirmatively negate an essential element of the nonmoving party’s claim or conclusively establish an affirmative defense. **McCarley v. West Quality Food Service**, 948 S.W.2d 477, 478 (Tenn. 1997). If the movant does not negate an essential element of the plaintiff’s claim or conclusively establish an affirmative defense, then the motion for summary judgment must be denied. **Id.** at 478-79. Courts are required to view the evidence in the light most favorable to the non-

¹ *Tenn. Code Ann.* § 28-3-105 provides as follows: “The following actions shall be commenced within three (3) years from the accruing of the cause of action: (1) Actions for injuries to personal or real property; (2) Actions for the detention or conversion of personal property; and (3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability.”

moving party and draw all reasonable inferences in the non-movant's favor. **Mooney**, 30 S.W.3d at 306; **White**, 975 S.W.2d at 529.

Metaphysical doubts and disputes concerning the facts will not stand in the way of granting a summary judgment. **Rollins v. Winn Dixie**, 780 S.W.2d 765, 767 (Tenn. Ct. App. 1989). However, any reasonable doubt concerning the existence of a genuine issue of material fact will. **Id.**; see also, **McCarley v. West Quality Food Service d/b/a Kentucky Fried Chicken**, 960 S.W.2d 585, 588 (Tenn. 1998); **Byrd**, 847 S.W.2d at 211. To be fatal to a summary judgment, the dispute must involve a "material fact" meaning a fact which relates directly to the claim or defense embodied in the summary judgment motion. **Rollins**, 780 S.W.2d at 767.

The trial court, in granting summary judgment in this case, found Church had not filed its complaint before the applicable statute of limitations had run. While the trial court's order does not explain how it reached its decision, the focus on appeal has been on the issue of whether Church's cause of action accrued more than three years before suit was filed on January 4, 2001.

III.

The parties assert the applicable statute of limitations is found in *T.C.A.* § 28-3-105 which governs actions for injuries to personal or real property. The proper statute of limitations to be used is determined by looking to the gravamen of the complaint. See, **Vance v. Schulder**, 547 S.W.2d 927, 931 (Tenn. 1977). The gravamen of the complaint is ascertained not by the theoretical foundation of the suit but by the relief sought. See, **Williams v. Thompson**, 443 S.W.2d 447 (Tenn. 1969). In this case, Church proceeds on a negligence theory based on Alexander's failure to advise Church of the changes in its insurance coverage, fraud, intentional interference with contract rights, fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty.² The relief sought under all these theories is damages for property loss as a result of the fire. Accordingly, we agree *T.C.A.* § 28-3-105 governs the instant case.

T.C.A. § 28-3-105 provides that actions for injuries to personal or real property must be commenced within three years from the accrual of the cause of action. In a suit for property damages, the cause of action accrues at the time the injury occurs, or when it is discovered, or when in the exercise of reasonable care and diligence the injury should have been discovered. **Prescott v. Adams**, 627 S.W.2d 134, 138 (Tenn.

² In Tennessee, an insurance agent employed to maintain insurance coverage for a client may be held liable on a negligence theory if the agent fails to use reasonable care and diligence in continuing the insurance, either by obtaining a renewal or replacement policy or by properly maintaining an existing policy. **Wood v Newman, Hayes & Dixon Ins. Agency**, 905 S.W.2d 559, 562 (Tenn. 1995); **Ezell v. Associates Capital Corp.**, 518 S.W.2d 232, 234 (Tenn. 1974). An important corollary to this is that the agent is charged with an affirmative duty to notify the client if he is unable to continue the previous coverage, and the failure of the agent to so notify the client will subject him to liability. **Wood**, 905 S.W.2d at 562.

Ct. App. 1981). The statute is tolled only during that period of time when the plaintiff had no actual knowledge of the wrong and, as a reasonable person, was not placed on inquiry notice. **Potts v. Celotex Corp.**, 796 S.W.2d 678, 680-81 (Tenn. 1990); **City State Bank v. Dean Witter Reynolds, Inc.**, 948 S.W.2d 729, 735 (Tenn. Ct. App. 1996). It does not allow the plaintiff to wait until he or she knows all of the injurious effects or consequences of the tortious act. **Woods v. Sherwin-Williams Co.**, 666 S.W.2d 77, 80 (Tenn. Ct. App. 1983). Ordinarily, the question of whether a plaintiff knew or should have known that a cause of action existed is a question of fact, inappropriate for summary judgment. **State Bank**, 948 S.W.2d at 735; **Prescott**, 627 S.W.2d at 139.

While the injury from Alexander's alleged negligence would have occurred when Church first began paying the premiums on the changed 1993 policy, Church argues its cause of action did not accrue and is within the limitations period because the injury was not discovered until 1999 when it submitted the claim for fire loss to the insurer. Alexander asserts the cause of action against it accrued before that time because the injury should have been discovered by Church had it exercised reasonable care and diligence.

In support of its contention, Alexander claims Debra Alexander spoke with Deacon Shines regarding the change of coverage from Aetna to Preferred Risk in 1993 and sent him a proposal for the replacement coverage before she prepared an application for insurance with Preferred Risk. Alexander also points to the fact that on the annual renewal certificate received by Church in 1993 the name of the insurer was listed as Preferred Risk, and Mrs. Johnson was aware of this change. Alexander argues this was enough to put Church on inquiry notice regarding a possible claim it may have had against Alexander. Furthermore, Alexander asserts had Church exercised reasonable care and diligence and made reasonable inquiries concerning the replacement policy issued by Preferred Risk, it would have discovered the replacement cost coverage was subject to the Preferred Risk policy limits. According to Alexander, because both Deacon Shines and Mrs. Johnson had previous dealings in the insurance industry, this change could have been discovered by a close reading of the yearly declarations page alongside the Preferred Risk policy, which Alexander claims it supplied to Church.

Were all these facts undisputed by Church, we would agree Church was indeed put on inquiry notice and should have discovered the injury caused by Alexander's alleged negligence. However, it is clear many of the facts Alexander relies upon are contested by Church. First, Church claims Deacon Shines never had any conversations with Debra Alexander or anyone else at Alexander regarding changes in Church's insurance policy. Church asserts Deacon Shines was not advised by Alexander of the change in the insurer or of the terms of the newly purchased policy in 1993 or at any time thereafter. Church argues Deacon Shines exercised reasonable care and diligence as he reviewed the yearly renewals and checked to make sure the replacement cost coverage option was still in effect at each renewal. Church also disputes Alexander's claim that a copy of the new Preferred Risk policy was sent to Church officials. Both Deacon Shines and Mrs. Johnson denied receiving such a copy. The importance and extent of Deacon Shines's and Mrs. Johnson's experience in the insurance industry is also placed in doubt by Church. According to Church, Deacon Shines's insurance experience spans sixteen months over a fifteen year period, and he was initially involved with procuring insurance for Church because of his friendship with the then part-owner of Alexander. While

Church admits Mrs. Johnson formerly worked as a homeowner underwriter for an insurance company, her position as record keeper and bookkeeper meant she was in charge of paying the yearly premiums. She did not have occasion to review the yearly renewal notices or compare them with Church's insurance policy.

The one fact Alexander relies upon which Church does not dispute is that Mrs. Johnson, in paying the yearly premium in 1994, noticed the name "Preferred Risk" on the renewal certificate. Church asserts Mrs. Johnson called Debra Alexander because she did not recognize the name and inquired to whom the premium check should be issued. Mrs. Johnson was then told it did not matter whether she made the check out to Preferred Risk or to Alexander and Pinnock because Alexander would get it either way. There was no further discussion as to the change, and, as she testified at her deposition, this did not concern Mrs. Johnson nor did it raise any "caution flags" in her mind.

Because we are required to view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-movant's favor, the question for the court comes down to whether the fact that Mrs. Johnson noticed the change in the name of the insurer is enough, as a matter of law, to put Church on inquiry notice. We cannot say that it is. This is a case in which the question of whether and when the plaintiff knew or should have known that a cause of action existed is a question of fact and is inappropriate for resolution through summary judgment. On appeal, Church has presented evidence of a dispute concerning a material fact—specifically, when Church was placed on inquiry notice. This material fact relates directly to the statute of limitations defense Alexander has raised in its motion for summary judgment because the statute is tolled only during the period of time when the plaintiff had no actual knowledge of the wrong and, as a reasonable person, was not placed on inquiry notice. Because Church has established the existence of a genuine issue of material fact by placing in doubt whether it was indeed on notice a cause of action against Alexander existed, we conclude the trial court erred in granting Alexander summary judgment.

IV.

Accordingly, for the reasons set out above, the order of the trial court granting Alexander summary judgment based on the statute of limitations is hereby reversed, and this cause is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against appellee Alexander.

DON R. ASH, SPECIAL JUDGE